REPUBLIC OF NAMIBIA Not Reportable

HIGH COURT OF NAMIBIA MAIN DIVISION, WINDHOEK

RULING ON RECUSAL

Case no: HC-MD-CIV-MOT-GEN-2019/00095

In the matter between:

THE LAW SOCIETY OF NAMIBIA **APPLICANT**

and

ALEX MABUKU KAMWI KAMWI **RESPONDENT**

Neutral citation: *The Law Society of Namibia v Kamwi* (HC-MD-CIV-MOT-GEN-2019/00095) [2019] NAHCMD 532 (4 December 2019)

Coram: ANGULA DJP
Heard: **16 October 2019**
Delivered: **4 December 2019**

Flynote and Summary: Application for recusal of a judge – Compliance with rule 32(9) and (10) not required in a recusal application – Grounds for seeking recusal – Reasonable apprehension of bias – Judge having presided over matters where the applicant was a party and the Judge made comments which applicant considered to be unfavourable about him – Judge being a former director of a law firm that represented party in a matter where the applicant was a party some 13 years ago. Judge not been involved in that matter. – Test for recusal – Double reasonableness test.

Held; no reasonable person in the position of the applicant would have had a reasonable apprehension of bias of the judge in the circumstances of this case. Application dismissed.

ORDER

1. The application for recusal is dismissed.

2. There is no order as to costs.

3. The main application is postponed to **22 January 2020** at **08h30** for allocation of hearing date.

RULING

ANGULA DJP:

Introduction:

[1] I have two applications before me. The main application has been brought by the Law Society of Namibia (LSN) against Mr Kamwi, the respondent, seeking an order declaring that the respondent is in contempt of an order of this court issued on 9 March 2005; a further consequential order convicting the respondent of contempt of court and imposing a fine or other appropriate sentence. The order in question *inter alia*, interdicted the respondent from practising or from holding himself as a legal practitioner; using the title legal practitioner, paralegal, paralegal practitioner, professional practitioner or any word, name title, designation or description implying or tending to induce the belief that he is a legal practitioner. The LSN alleges that respondent refuses to comply with the said court order and his conduct is contemptuous of the court order.

[2] The second application is of an interlocutory nature. In that application, Mr Kamwi seeks the recusal of the court, as presently constituted. As a result of the recusal application the main application has been held in abeyance pending the outcome of the recusal application. The court will proceed to consider the respondent's recusal application.

[3] The Law Society does not oppose the application. The court was however of the view that it would be of assistance to the court if counsel for the LSN could file written submissions in order to avoid what might degenerate to an adversarial dialogue between the court and the applicant and further considering the fact that the impartiality of presiding judge is at the core of the application. The court wishes to express its appreciation to Ms Garbers-Kirsten for her written submissions.

[4] The court will refer to Mr Kamwi as 'the applicant' in this interlocutory application. In prayer one of his notice on motion the applicant seeks an order: 'That Hon. Justice Angula recuses himself from hearing any of my cases'.

[5] The applicant described himself as the holder of a Bachelor of Laws Degree (LLB) Hons; a diploma in Legal Studies including Legal Practice; and a diploma in law as a Paralegal. It is the applicant's case that the Supreme Court has pronounced itself on his suitability in a reported case of *Kamwi v Duvenhage and Another* 2008 (2) NR 656 (SC) to hold him 'to the same standard of accuracy, skill and precision in the presentation of my case required of lawyers for the reason amongst others, that it has noted (acknowledged i.e acceded to or accepted or approved) my presentation and credentials that I am a paralegal professional; and a qualified legal adviser'. The applicant further asserts that he is a qualified lawyer litigating in person. In this connection the applicant points out that the High Court 'by its own conduct in the case of *Kamwi v Law Society of Namibia* Case number A 2/2016 at page 54 made an authoritative pronouncement that I cannot give evidence now. I am a lawyer now'.

[6] When the matter was called for the first case management conference hearing the applicant simply filed this application seeking an order for the recusal of the court as presently constituted.

Point *in limine*

[7] As mentioned earlier, the Law Society did not oppose that recusal application, however Ms Garbers-Kirsten raised a point *in limine* in her written submission relating to the applicant's non-compliance with rule 32(9) and (10). Counsel argues that the application for recusal is interlocutory and therefore rule 32(9) and (10) have to be complied with.

[8] The court is of the view that the sub-rules are not applicable. Sub-rule (9) provides *inter alia* that a party wishing to bring an interlocutory application must seek an amicable resolution 'with the other party or parties and only after the parties have failed to resolve their dispute' may an interlocutory application be brought.

[9] A recusal application may fall under the category of interlocutories in so far as its outcome is not determinative of the issues between the parties. A recusal application is however not based on a 'dispute' between the parties. It is an issue between the applicant for recusal and the court. The issue of actual alleged bias or apprehension of bias is incapable of being amicably resolved between the parties to the proceedings, because it has nothing to do with the dispute between the opposing parties. The issue of bias is directed by the applicant at the presiding judge and has no bearing on the other party and for that reason it cannot be 'resolved amicably as contemplated in in sub-rule (9)'.

[10] The applicant in the present matter was therefore not required to comply with the said rule. For the foregoing reasons, this court is of the view that the point *in limine* is not good and cannot be upheld.

Grounds for recusal

[11] The applicant sets out his grounds for recusal in his notice of motion upon which he relies for the relief claimed namely that; 'there is apprehension that Justice Angula DJP might be bias (sic)'; and 'the suspicion is based on the facts as articulated in my founding affidavit which shall be used in support of this application'.

Applicable legal principles

[12] The legal principles at play when an application for recusal of the presiding judge or judicial officer is under consideration were restated by the Supreme Court in *Aupindi v Magistrate H Shilemba*[1]. The court stressed at para [30] that the test for recusal is actual bias or a reasonable apprehension of bias. The *onus* is on the applicant to rebut the presumption of judicial impartiality. The court then proceeded to set out the test in detail as follows:

> '[19] Firstly, the test is whether the reasonable, objective and informed person would on the correct facts reasonably apprehend that the Judge will not be impartial.
>
> [20] Secondly, the test is an objective one. The requirement is described . . . as one of 'double reasonableness'. Not only must the person apprehending the bias be a reasonable person in the position of the applicant for recusal but the apprehension must also be reasonable. Moreover, apprehension that the Judge may be biased is not enough. What is required is an apprehension, based on reasonable grounds, that the Judge will not be impartial.
>
> [21] Thirdly, there is a built-in presumption that, particularly since Judges are bound by a solemn oath of office to administer justice without fear or favour, they will be impartial in adjudicating disputes. As a consequence, the applicant for recusal bears the onus of rebutting the weighty presumption of judicial impartiality. As was pointed out by Cameron AJ . . . the purpose of formulating the test as one of 'double-reasonableness' is to emphasise the weight of the burden resting on the appellant for recusal.
>
> [22] Fourthly, what is required of a Judge is judicial impartiality and not complete neutrality. It is accepted that Judges are human and that they bring their life experiences to the Bench. They are not expected to divorce themselves from these experiences and to become judicial stereotypes. What Judges are required to be is impartial, that is, to approach the matter with a mind open to persuasion by the evidence and the submissions of counsel.
>
> And further:

[1] *Aupindi v Magistrate H Shilemba* Case No. SA 7/2016, delivered on 14 July 2017.

[32] A judicial officer must not treat an application for recusal as a personal affront[2]:

> "A judicial officer should not be unduly sensitive and ought not to regard an application for his recusal as a personal affront. (Compare *S v Bam* 1972 (4) SA 41 (E) at 43G-44). If he does, he is likely to get his judgment clouded; and, should he in a case like the present openly convey his resentment to the parties, the result will most likely be to fuel the fire of suspicion on the part of the applicant for recusal. After all, where a reasonable suspicion of bias is alleged, a Judge is primarily concerned with the perceptions of the applicant for his recusal for, as Trollip AJA said in *S v Rall* 1982 (1) SA 828 (A) at 831 in fin-832:
>
> > "(T)he Judge must ensure that 'justice is done'. It is equally important, I think, that he should also ensure that justice is seen to be done. After all, that is a fundamental principle of our law and public policy. He should therefore so conduct the trial that his open-mindedness, his impartiality and his fairness are manifest to all those who are concerned in the trial and its outcome, especially the accused."
>
> (See also *S v Malindi and Others* 1990 (1) SA 962 (A) at 969G-I and cf *Solomon and Another NNO v De Waal* 1972 (1) SA 575 (A) at 580H; *S v Meyer* 1972 (3) SA 480 (A) at 484C-F). A Judge whose recusal is sought should accordingly bear in mind that what is required, particularly in dealing with the application for recusal itself, is 'conspicuous impartiality'.

And further at para 33.

[33] Lastly, in respect of the approach to such applications it should be stressed that whereas a judicial officer should recuse himself where the facts warrant this, it is also his or her duty not to do so where the facts do not warrant a recusal[3]:

[35] The presumption of impartiality and the double requirement of reasonableness underscore the formidable nature of the burden resting upon

---

[2] *Moch v Nedtravel (Pty) Ltd t/a American Express Travel Service* 1996 (3) SA 1 at 13H – 14C.
[3] *Bernert v ABSA Bank Limited* 2001 (3) SA 92 (CC) para [35].

> the litigant who alleges bias or its apprehension. The idea is not to permit a disgruntled litigant to successfully complain of bias simply because the judicial officer has ruled against him or her. Nor should litigants be encouraged to believe that, by seeking the disqualification of a judicial officer, they will have their case heard by another judicial officer who is likely to decide the case in their favour. Judicial officers have a duty to sit in all cases in which they are not disqualified from sitting. This flows from their duty to exercise their judicial functions. As has been rightly observed, '(j)udges do not choose their cases; and litigants do not choose their judges'. An application for recusal should not prevail, unless it is based on substantial grounds for contending a reasonable apprehension of bias.'

[13] With those principles in mind, I now turn to consider the applicant's grounds for recusal in detail. Ms Garbers-Kirsten correctly points out in her written submission that if regard is had to the notice of motion in so far as the applicant alleges that the bias is based on mere 'suspicion', the applicant has applied a wrong test. It should however be pointed out that in para 10 of his supporting affidavit the applicant states that: 'The grounds upon which I rely for my notice of motion for recusal are that there are reasonable grounds to believe that he might be bias as he did in other cases such as: This statement is not supported by the grounds as set out in the notice of motion'. Be that as it may, the court now turns to consider the respective grounds.

Court's remarks in taxation review matter – Kamwi v Standard Bank Namibia Ltd

[14] The first ground for the recusal is based on the remark made by the court in the course of the judgement in *Kamwi v Standard Bank Namibia Limited*[4]. In that matter the court had to determine whether the applicant, who was not an admitted legal practitioner was entitled to recover costs he allegedly incurred for the time he spent performing work related to litigation in which he acted in person. The applicant argued that he was entitled to recover his costs just as an admitted legal practitioner would be entitled to. In the course of the judgment the court made the following remark:

> '[10] Mr Kamwi concedes in his written submissions that he is 'not (an) admitted legal practitioner and cannot therefore enjoy the rights the legal practitioners are

[4] *Kamwi v Standard Bank Namibia Ltd* (A 101/2011) (2018) NAHCMD 196 (29 June 2018).

entitled to'. Despite this concession, Mr Kamwi, stubbornly, I should say, attempts to argue that he is entitled to recover costs for the time he has spent performing the work in person 'because time is an expense'.'

[15] The applicant now complains that 'no doubt [the remark] displays the scourges of biasness (sic) and a reasonable suspicion that he might be bias (sic)'.

[16] This court is of the view that, read in the context, the remark was appropriate and justified in the circumstances. This is because, if regard is had to the court's justification stated in paras [11] and [12] of the judgment, which read as follows:

'[11] As indicated earlier, this is not the first time that Mr Kamwi is advancing the same argument. He raised the same argument in a similar taxation review in *Standard Bank Namibia Limited v Nationwide Detectives and Professional Practitioners CC* (I 2051/2007) [2013] NAHCMD 200 (17 July 2013). The argument was considered and rejected by Parker AJ. The learned judge expressed himself as follows:

> "[4] From the foregoing, the following conclusions emerge inevitably. A lay litigant who represents himself or herself is entitled to only actual disbursements that have been reasonably incurred. He or she 'is not entitled to claim any fees for his labour, or loss of earning opportunity, in a bill of costs. He cannot take instructions, charge for drafting, perusal of any item in Schedule 6 (of the Rules of Court). (Those items can only be charged by virtue of the fact that someone is an admitted legal practitioner.)' (*Nationwide Detectives v Standard Bank of Namibia Ltd (HC)* at 599E.) These are well-founded principles and so I accept them as a correct statement of law. I, therefore, adopt them in the instant proceeding. It follows irrefragably that fees charged for Mr Kamwi's labour or loss of earning opportunity in Mr Kamwi's bill of costs cannot be allowed by the taxing master. If the taxing master allowed them, the decision of the taxing master would fly in the face of the well-founded principles I have adverted to previously."

[12] I fully agree with the legal position as set out by my Brother Parker in the passage quoted above. Significantly, Mr. Kamwi, who was one of the respondents together with his wife and his company, in that matter, while well aware of that judgment, did not refer to it in his submissions in this matter. Instead, he referred to

> some other inapplicable judgments. I consider Mr. Kamwi's deliberate decision not to refer the court to a case law which is on point for decision, rather disingenuous and not being open and transparent with the court. For a person who aspires to one day in the future, become an admitted legal practitioner, it leaves a question whether he would be worthy of being a member of what is commonly referred as an 'honourable profession'.'

[17] This court is of the considered view that, even after sober reflection with passage of time, what the applicant did in that matter was inappropriate and warranted an admonition or a strong rebuke from the court. Not only did the applicant's conduct amount to an abuse of court's process, in that he sought to convince the court of a matter which he knew had already been decided upon by another court, which decision went against him and which he did not appeal against. In addition, the applicant's conduct in that matter amounted to a material non-disclosure. He failed to take the court into his confidence by not disclosing to the court that another court had ruled against him on that point. A litigant, whether in person or a legal practitioner, is under a legal duty to disclose to court case law in his or her knowledge even if that authority might be against his or her case or interest. Upon disclosure he or she can argue to persuade the court that the other court was wrong or the present case is distinguishable.

[18] Taking into account all foregoing facts and other considerations, this court is of the considered view that there is no merit in the applicant's complaint that the court's remark complained of by the applicant, displays bias on the part of this court. Furthermore, that if the remarks complained of by the applicant are, properly considered in context, no reasonable, objective and informed person would reasonably entertain an apprehension that this court would not be impartial in the main application. Accordingly this ground is rejected.

Court's remarks in Kamwi v Minister of Justice and Others[5]

[19] The applicant alleges that the following statement by this court in the above matter, leaves him 'in no doubt of having suspicion that this court might be bias (sic)'. The remarks read thus:

---

[5] Case No. HC-MD-CIV-MOT-GEN 2016/00333.

'I take judicial notice of the fact that Mr Kamwi has litigated in numerous cases before this court and is well conversant with the rules of this court and the practice directions. He has initiated so many cases before this court and is aware of how the service of process works and the fact that it is effected by the deputy-sheriff. His failure to comply with the rules is irrational in the circumstances.'

[20] In that matter, it was common cause that the applicant, who was also the applicant in that matter, acting in person, caused some application papers initiating the proceedings to be served by the deputy-sheriff. However the service upon the second respondent was effected not by the deputy-sheriff, but was served by the applicant himself. An objection as to the propriety of the service was raised by one of the respondents which was upheld by the court and the matter was struck from the roll with costs.

[21] The complaint is rather baffling. As has been noted earlier in this ruling, on his own version, the applicant praises himself for having been held by the Supreme Court to the same standard in the presentation of his case as that of the 'qualified lawyers', by which he understood to mean that the Supreme Court referred to him as an admitted legal practitioner. This court is of the view that it was entitled to demand and to expect from the applicant the standard for which he prided himself. The applicant's conduct was not only contradictory in the same proceedings, but there was no explanation why he acted contrary to the rules of the court with which he is or should be well conversant. From the court's point of view, the applicant's conduct was irrational. The applicant cannot restrict or regulate how the court should express itself as long as such expression is within the boundaries of fairness and is justified in the peculiar circumstances. The court is of the view that objectively considered, no reasonable, objective and informed person would consider the said remark as a display of bias on the part of the court.

[22] As has been noted when considering the applicable principles, the fact that an applicant harbours an apprehension that a judge may be biased is not enough: what is required is an apprehension based on reasonable grounds. In the court's view, the remarks complained of by the applicant in the present matter, would not evoke a reasonable apprehension in the mind of an informed, objective and reasonable

person. The complaint appears to be, in the words of the Supreme Court, that of a ‘disgruntled litigant because the judicial officer has ruled against him or her’. The ground is frivolous and stands to be rejected.

[23] Before the court proceeds to consider the next ground, the court is of the opinion that this appears to be an appropriate juncture to contrast the applicant’s statements of complaints with applicant’s statements of praise for this court when the court’s pronouncements are in his favour albeit some of them are completely taken out of context in either case.

[24] For instance in *Kamwi v Law Society of Namibia,* the applicant cites the incident when he was appearing in person and was busy making oral submissions and then he switched from making submissions to giving evidence on the procedure followed by a University in sending examination results to stundents. The court reminded him that he could not give evidence because ‘You are a lawyer now’. It was clear that the court was simply reminding the applicant that he was playing a role of a lawyer at that juncture and not a role of a witness. The applicant now claims that this statement is ‘an authoritative pronouncement by this court that I cannot give evidence now. I am a lawyer now’. He uses this statement to advance his claim that he is a qualified lawyer. He goes further to elevate the statement to the status of a ‘ruling’. In this connection this court is of the view that the applicants approach is transparently disingenuous if not an unfair misrepresentation or manipulative presentation of the real facts.

[25] Lastly, on this aspect, the applicant endorses the observation by this court in *Kamwi v Standard Bank Namibia Limited* (supra) when this court granted him leave to appeal, that the issue of costs in litigation in which the applicant personally appeared, appeared to be of substantial importance to his business and or professional pursuit.

[26] The conclusion to be drawn from the foregoing is that, when this court makes an adverse finding or ruling against the applicant, then in that event the applicant complains that the court is biased. On the other hand, when the court makes a finding or ruling favourable to his cause then the applicant says the court is acting

fairly. Such an attitude cannot be countenanced. Courts make decisions based on facts and law and not on whims or on who the litigants before court are.

Out of court settlement in Telecom Namibia v Nationwide Detective and Professional Practitioners and Another[6]

[27] In this ground, the applicant alleges that in the case referred in the subheading above, he was successful to the extent that *Telecom Namibia* requested an out of court settlement which was done. At that time, some 13 years ago, Judge Angula was a director of LorentzAngula Incorporated, a law firm, which represented *Telecom*. The applicant states that he harbours an apprehension which he believes is reasonable that the court's 'resentment against me might have stemmed from that case (sic)'. As a respected judge, knowing that his firm, I and the Corporation was the sole member to had a legal crash, he would have recused himself from hearing any of my cases.

[28] Before embarking on the discussion of this ground, the court is of the view that reference to the observation by Damaseb JP in *Maletzky v Zaaruka: Maletzky v Hope Village*[7] is apposite. The court said the following in that case:

> '[26] An accusation of judicial bias or partiality is therefore one not lightly to be made or countenanced. It must be supported by either cogent evidence or be founded on clear and well-recognised principles accepted in [a] civilised society governed by the rule of law. If judicial bias or partiality is too readily inferred , it opens the door to all manner of flimsy and bogus objections being raised to try and influence the judicial process by shopping around for the so-called correct judge – in effect litigants or those causes before court seeking to decide who should sit in judgment over them.'

[29] The statement is apposite, especially taking into account that the applicant is not only asking that the judge recuses himself from this particular matter but is demanding that the judge 'recuses himself from hearing any of my cases'. The demand, if it were to be acceded to, will have far-reaching consequences in that it will create a precedent whereby litigants can demand which judge should or should

[6] Case No. I 2947/05 heard on 10 July 2006.
[7] I 292/2017; I 3274/2011 [2013] NAHCMD 343 (19 November 2013) at para 26.

not preside over their cases. Such a situation cannot be countenanced. Judicial impartiality is presumed and judges have a duty to preside over cases assigned to them. The applicant has to provide cogent reasons in each and every case why the judge should recuse himself or herself from each case. He cannot have so to speak a carte blanche in deciding which judge shall or shall not preside over all his matters.

[30] Reverting to the specific ground relating to the *Telecom* matter, Ms Garbers-Kirsten in her written submissions correctly, in the court's view, points out that there is no indication that Judge Angula was indeed involved in the *Telecom* matter and from the respondent's allegations it seems that he was not and he also had no knowledge of the matter at all. There is also no suggestion that Judge Angula will promote LorentzAngula's cause if he adjudicates the current matter. His ex-legal firm is not a party to this matter. What is significant with this rather mischievous allegation is the fact that the applicant must be presumed to know the name of the lawyer at LorentzAngula with whom he negotiated the said settlement. If it was Judge Angula, it would have been the easiest fact to state without equivocation.

[31] On the applicant's version, the settlement was requested by the law firm. It is objectively humanly inconceivable that a legal representative can develop resentment towards an opposing party, as result of a settlement which was initiated on behalf of a client of that law firm, let alone a legal practitioner who was not involved in the settlement of the matter. Legal practitioners do not generally associate themselves with their client's causes and there is no indication or allegation that this case was any different.

[32] It is necessary to point out that, that this court has previously presided over a number of matters where the applicant was a party[8]. In none of those cases did the applicant apply for the Court's recusal on the ground that he had a reasonable apprehension that the court would not be impartial stemming from the settlement in the *Telecom* matter. In those circumstances the only reasonable inference this court can draw is that the so-called ground for recusal is an afterthought based on recent speculative hypothesis and is not based on an objective or reasonable belief. The court is of the view that the ground is far-fetched to the extent that no reasonable,

[8] *Kamwi v The Law Society of Namibia* (A 2/2016) [2016] NAHCMD 319 (19 October 2016).

objective and informed person would entertain a reasonable apprehension of bias under the circumstances of this case.

[33] Taking all the considerations and the applicable legal principles into account, the court has arrived at the conclusion that the applicant has failed to discharge the onus on him by proving actual bias and or a reasonable apprehension of bias on the part of this court as presently constituted.

[34] Finally, it is necessary to state that this court does not know the applicant in any capacity other than him appearing before it. The court has no personal knowledge or interest about his affairs whether personal or professional. The court is under an obligation to adjudicate the main application as its solemn duty and in accordance with the oath of office taken as provided for in the Constitution of this Republic.

[35] In the result the following order is made:

1. The application for recusal is dismissed.

2. There is no order as to costs.

3. The main application is postponed to **22 January 2020** at **08h30** for allocation of hearing date.

_____

H Angula

Deputy-Judge President

APPEARANCES:

APPLICANT:	H KIRSTEN-GARBERS Instructed by Köpplinger-Boltman Legal Practitioners, Windhoek
RESPONDENT:	In person